IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1857

STATE OF OREGON, Petitioner

vs.

JAMES EDWARD BRADSHAW, Respondent

On Petition for a Writ of Certiorari to
the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

GARY D. BABCOCK
Public Defender for Oregon
JOHN DAUGIRDA
Deputy Public Defender for Oregon
1655 State Street
Salem, OR 97310
Telephone: (503) 378-3349

Counsel for Respondent

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	1
CONCLUSION	6
APPENDIX A: INTERVIEW BY CORPORAL HAYS OF RESPONDENT AT ROCKAWAY POLICE STATION ON SEPTEMBER 14, 1980, EXCERPT OF STATE'S EXHIBIT NO. 2	7,8

TABLE OF AUTHORITIES

Cady v. Dombroski, 413 US 433, 442 (1973)	3
Edwards v. Arizona, 451 US 477 (1981)	1,2,5,6
Michigan v. Mosley, 423 US 96 (1975)	6
Miranda v. Arizona, 384 US 436 (1966)	1,4
Rhode Island v. Innis, 446 US 291, 300-301 (1980)	4
State v. Bradshaw, 54 Or App 949, 953, 636 P2d 1011, 1013 (1981)	4
Steagald v. United States, 451 US 204, 208-209 (1981)	3

QUESTION PRESENTED

Respondent submits that the question presented in this case is more accurately stated as follows:

> "Does a police officer violate the limits of custodial interrogation established in Edwards v. Arizona, 451 US 477 (1981) where he reinterrogates an arrestee concerning his culpability after the arrestee had previously invoked the right to counsel and asked the limited procedural question 'What is going to happen to me now?'"

OPINIONS BELOW
JURISDICTION
CONSTITUTIONAL PROVISIONS INVOLVED

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of these matters as supplemented and clarified by additional facts set forth in the argument below.

REASONS FOR DENYING THE WRIT

I.

THE PRESENT CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION. THE OREGON COURT OF APPEALS PROPERLY APPLIED THE STANDARDS ANNOUNCED IN EDWARDS V. ARIZONA, 451 US 477 (1981) TO THE LIMITED FACTS OF THIS CASE.

This case does not present a significant federal question. The constitutional standard for reviewing statements uttered after an arrestee's assertion of the right to counsel has been settled since Miranda v. Arizona, 384 US 436 (1966).[1] The standard was reconfirmed and clarified in Edwards v. Arizona, 451 US 477 (1981) as follows:

---

1. In Miranda, this Court announced the procedures to be followed when the person in custody asks to consult with a lawyer, as follows:

(Footnote continued on Page Two)

"* * * [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." 451 US at 484-485

There is no present conflict among the state or federal courts concerning the application of the Edwards holding.

The Oregon Court of Appeals properly applied the Edwards standard to this limited factual record. This Court should deny petitioner's request to re-examine the state court's factual determination and their limited holding, because this individual case will have marginal (if any) impact on cases arising in other jurisdictions.

The Court of Appeals' opinion provided:

Footnote 1 continued:

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

"This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." 384 US at 474

"We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.

"The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. The *Edwards* court emphasized that

> "'it is inconsistent with *Miranda* and its progeny for authorities, *at their instance*, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.' (Emphasis supplied.) 68 L Ed 2d at 387.

"Thus, under the reasoning enunciated in *Edwards*, defendant did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible."

Petitioner's three proposed reasons for granting the writ are impersuasive.

(1) Interrogation

Petitioner should be precluded from claiming the absence of interrogation for the first time in this Court, because it failed to raise and argue the issue in the Oregon courts. Steagald v. United States, 451 US 204, 208-209 (1981); Cady v. Dombroski, 413 US 433, 442 (1973).

Also, the record supports the state court's finding that respondent was interrogated after he invoked the right to counsel.

On September 14, 1980, Corporal Hays interviewed defendant at the city police station concerning his

alibi.[2] Hays asked respondent 90 questions concerning the details of his alibi, arrested him for furnishing alcohol to a minor, confronted him with his theory of respondent's culpability, and asked respondent for his reaction. (State's Exhibit No. 2 in trial file).[3] Minutes after respondent asserted the right to counsel, the police officer summarily reminded respondent of his rights, briefly answered a procedural inquiry, reiterated his theory of respondent's culpability, and suggested that respondent could take a polygraph examination to clear the matter up (Tr 22-25).

Respondent believes this repeated use of questions, confrontive assertions, and suggestions constituted interrogation "reasonably likely to elicit an incriminating response". Rhode Island v. Innis, 446 US 291, 300-301 (1980); Miranda v. Arizona, supra.[4]

(2) Police Initiated Interrogation

The Oregon Court of Appeals properly found that Corporal Hays initiated further interrogation minutes after respondent asserted the right to counsel. State v. Bradshaw, 54 Or App 949, 953, 636 P2d 1011, 1013 (1981).

2. Immediately preceding the station interview, Hays had contacted respondent near his residence, and questioned him about his knowledge of Lloyd Reynolds, the deceased, and respondent's whereabouts on the previous evening when Reynolds had died (Tr 14-15). Respondent maintained he had been with Reynolds and others at a party, that a third person assaulted him, knocking him unconscious, and he was not with Reynolds during the automobile accident (Tr 15). Based on certain inconsistencies in respondent's alibi, Hays asked him to accompany him to the Rockaway Police Station for a taped interview (Tr 16). Respondent complied (Tr 16).

3. Representative portions of the 26 page interview (State's Exhibit No. 2) are set forth as Appendix A.

4. Similarly, on September 15, 1980, State Police Officer Rainey administered a polygraph examination, accused respondent of lying, and questioned him to clarify his responses (Tr 43-48, 74-75). Rainey's remarks were also interrogation. Rhode Island v. Innis, supra.

Respondent believes his limited question about a procedural matter did not amount to a waiver and a request to reopen further interrogation as contemplated by this Court in Edwards v. Arizona, supra, 451 US at 484-485.

Post-arrest "administrative conversations" do not waive the right to counsel. In Oregon, state agents routinely converse with arrestees on procedural matters before one's summoned attorney arrives at the jail or before counsel is appointed at arraignment. "Administrative conversations" may occur in a variety of situations:

> (1) Conversations enroute to the station (e.g., discussion concerning safekeeping an arrestee's automobile, cancelling an appointment, or notifying a relative);
>
> (2) Conversations during booking procedures (e.g., intake interview, identification photographs and fingerprinting, search of person, exchange of clothes and property, inventory of property, and jail orientation rules);
>
> (3) Conversations during the taking of physical evidence (e.g., blood, breath or hair samples, or fingernail scrapings);
>
> (4) Conversations during an arrestee's interview with a security release officer in his application for release and for appointment of counsel, ORS 135.040 et. seq.; and
>
> (5) Conversations related to an arrestee's request for a telephone call to counsel, for medical assistance, or related requests.

Respondent believes his inquiry "What is going to become of me now?" was a limited "administrative question" and not a waiver of his right to counsel. The Court of Appeals correctly concluded that "the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test" (54 Or App at 953, 636 P2d at 1013). The police officer -- not respondent -- initiated reinterrogation.

(3) Right to Counsel Standard

In its third theory, petitioner claims "the arresting officer's resumption of his conversation with the defendant in this case more closely resembles the non-coercive questioning of a properly advised defendant which was upheld in Michigan v. Mosley, 423 US 96 (1975), than the coercive tactics condemned in Edwards." (Pet. at 8).

Respondent perceives no conflict between Mosley and Edwards. In Mosley, an armed robbery suspect who was re-interviewed by police after once refusing to talk had merely invoked his right to remain silent, not his right to counsel. This Court has specifically adverted to this distinction, and the different rules which flow from it in Edwards, 451 US at 485, and in Mosley, 423 US at 102 n. 7. As stated in Edwards, "[T]he Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel * * *" (451 US at 484). Mosley does not aid petitioner in this case.

In summary, the police officer initiated re-interrogation of respondent after he invoked the right to counsel. Respondent did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible.

CONCLUSION

The decision of the Court of Appeals of the State of Oregon was clearly correct, and the petition for the writ of certiorari should be denied.

GARY D. BABCOCK
Public Defender for Oregon
JOHN DAUGIRDA
Deputy Public Defender for Oregon
Counsel for Respondent

APPENDIX A

INTERVIEW BY CORPORAL HAYS OF RESPONDENT AT ROCKAWAY POLICE STATION ON SEPTEMBER 14, 1980, EXCERPT OF STATE'S EXHIBIT NO. 2 (SEE PAGE FOUR, ABOVE)

"Q. [CORPORAL HAYS:] I'm talking to Mr. Bradshaw regarding two investigations, one involving an assault which he reported occurred to him last night, investigated by Officer Buxton and Rockaway Police Department; the investigation of a fatal accident which was discovered this afternoon, victim, last name is REYNOLDS, first name is LOWELL CLIFFORD, and the accident occurred on Hwy 101 near milepost 48. Do you understand what we're talking about here?

"A. [RESPONDENT:] Yes, I do.

"* * * * *.

"Q. Okay. Now, I want you to go through the events that happened yesterday, at uh, when you had contact with Lowell, when you first had contact with Lowell Reynolds, and what happened all the way through until you were contacted by Officer Buxton on the assault case, approximately 8:15. Can you tell me what time you first contacted Lowell yesterday?

"* * * * *.

"Q. During the period of time that uh, these two girls and these two guys were there, do you recall what, what happened when all, when all six of you were there. You had two guys, two girls, you, and Lowell. Were you just drinking whiskey or . . .

"* * * * *.

"Q. The thing is we want to determine exactly what happened last night. So, in going over your mind, as best you can remember, the people that were in the apartment at the time you got hit on the head was Lowell . . .

"* * * * *.

"Q. Okay, and what about, did the other guy ever identify himself?

"* * * * *.

"Q. Uh huh. Have you, do you have a driver's license in Oregon?

"A. No, I haven't, haven't a driver's license because I've been, I'm an habitual traffic offender.

"Q. Okay, so you (inaudible) . . .

"A. (Inaudible) black ice, and I run an officer off the road, State highway patrolman off the road. But I got this ID card here.

"Q. Okay.

"A. (Inaudible)

"Q. You're a habitual in the state of Oregon?

"A. Uh huh.

"Q. Okay, how long . . .

"A. Outside Oregon I can drive.

"Q. Yeah. How long have you been suspended in Oregon as habitual offender?

"A. I'd say it was, 26, not really for sure, but I think Judge Donald Kalberer, down there in Columbia County, typed in a, suspended me the 26th of December of '79.

"* * * * *.

"Q. I'm going to throw something at you here, Jim, and I'm going to pitch a theory, and I'm going to tell you what I'm going to do. Right now I'm going to place you under arrest for furnishing liquor to a minor. Do you understand that?

"A. Yeah.

"Q. Okay. After placing you, you're no longer free to go. You're in custody.

"A. Okay.

"Q. Okay. Now, you have the right to remain silent. Anything you say or do can and will probably be used against you in a court of law. Do you understand that? You have the right to have an attorney present while being questioned. Do you understand that?

"A. Uh huh.

"Q. If you cannot afford an attorney and meet certain requirements set by the court, the court will appoint you one to represent you, do you understand that?

"A. Yes, I do.

"Q. Okay. We've contacted three out of the four people you indicated that was at the apartment last night. All of them have witnesses indicating they were not there. And it's going to be my theory that you were driving that pickup, ran off the road because you had too much to drink, got scared because you--I'm just giving you my theory. You got scared because you're a habitual offender, and a result of that accident is how you hurt your head. Then you came back and called the police. This is my theory only. It may not be right, but I'm just telling you how I feel about it. Am I close?

"A. No. You're one hell of a long ways from it.

"Q. Okay. Were you in the vehicle last night?

"A. No, I was not.

"Q. Even as a passenger?

"A. I've got witnesses to that.

"Q. Okay, can you tell me who the witnesses were?

"A. For one, my grandmother and Larry Moron or Moorehead, whichever one his last name may be.

"Q. (Inaudible)

"A. And I do want an attorney before it goes very much further.

"Q. Okay.

"A. This is one rap I won't, I won't take . . .

"Q. Okay.

"A. (Inaudible)

"Q. At this point, there's, since you requested an attorney, uh, we will conclude this investigation, all right? Not the investigation, but the interview.

"A. Sounds fine with me, because this is one thing that . . .

"Q. Okay. I'm just . . .

"End of tape."

Office - Supreme Court, U.S.
FILED
JUN 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1857

STATE OF OREGON, Petitioner

vs.

JAMES EDWARD BRADSHAW, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, James Edward Bradshaw, now residing at Oregon State Penitentiary, Box 43248, 2605 State Street, Salem, Oregon, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari filed by the State of Oregon on April 5, 1982, to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on December 1, 1981, without prepayment of costs and to proceed in forma pauperis. The respondent's affidavit in support of this brief in opposition is attached hereto.

GARY D. BABCOCK
Public Defender for Oregon
JOHN DAUGIRDA
Deputy Public Defender for Oregon
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1857

STATE OF OREGON, Petitioner

v.

JAMES EDWARD BRADSHAW, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, James Edward Bradshaw, being first duly sworn according to law, depose and say, in support of my application for leave to proceed without being required to repay the costs or fees:

1. I am respondent in the above entitled case.

2. Because of my poverty I am unable to pay the costs of said cause, and still provide myself with the necessities of life.

3. I am unable to give security for the same, and still provide myself with the necessities of life.

4. I believe I am entitled to the redress I seek in said cause.

5. I am unable to obtain from the court below a certified copy of the record without payment of fees and costs.

6. I was charged in Tillamook County, Oregon, with manslaughter in the first degree, ORS 163.118, driving while under the influence of intoxicants, ORS 487.540, and driving while revoked, ORS 487.560. I was tried and convicted of all charges in a trial before the court. The Tillamook County

Circuit Court imposed a seven year sentence with a three year minimum term for manslaughter, a concurrent three year term for driving while revoked and a five month and six day jail sentence for driving while under the influence of intoxicants. I appealed these convictions to the Court of Appeals of the State of Oregon, which reversed and remanded for a new trial. 54 Or App 949, 636 P2d 1011 (1981). The Supreme Court of the State of Oregon denied the state's petition for review, 292 Or 568, ___ P2d ___ (1982).

This brief in opposition is filed for the purpose of urging this court to deny the Petition for Writ of Certiorari sought by the State of Oregon.

James Edward Bradshaw
JAMES EDWARD BRADSHAW, Respondent

Subscribed and sworn to before me this 10 day of June, 1982.

D Lunwald
NOTARY PUBLIC FOR OREGON
My Commission Expires: March, 1984